Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	

COMMENTS OF PANAMSAT ON PETITIONS FOR CLARIFICATION OR RECONSIDERATION OF GE AMERICOM AND COLUMBIA

PanAmSat Corporation ("PanAmSat"), by its attorneys, hereby comments on the Petitions for Clarification or Reconsideration of GE American Communications, Inc. ("GE Americom") and Columbia Communications Corporation ("Columbia") submitted in connection with the Commission's Report and Order in the above-captioned proceeding (the "Universal Service Order").

As discussed below, PanAmSat agrees with GE Americom and Columbia that: (i) Universal Service Fund (the "USF") contribution obligations for satellite operators should be based solely on end-user revenues derived from the provision by such operators of interstate *telecommunications services*, and should not be based on end-user revenues derived from the provision of interstate *telecommunications*; (ii) the provision by satellite operators of bare transponder capacity does not constitute "telecommunications" under Section 3(43) of the Communications Act of 1934, as amended (the "Act"); and (iii) it is inconsistent with Section 254(d) of the Act to use revenues derived from the provision of international telecommunications services and international telecommunications to calculate an entity's USF contribution obligation.

I. SATELLITE OPERATORS' USF CONTRIBUTIONS SHOULD BE BASED SOLELY ON REVENUES DERIVED FROM COMMON CARRIER SATELLITE SERVICES.

Section 254(d) of the Act requires providers of "interstate telecommunications services"[1] to contribute to the USF "on an equitable and nondiscriminatory basis" and, further, gives the Commission authority to require other providers of "interstate telecommunications" to contribute to the USF if the public interest so requires. As noted by Columbia and GE Americom in their respective Petitions, the Joint Board's Recommended Decision directed the Commission to require only those entities providing interstate telecommunications services to contribute to the USF.[2] Having carefully considered the issue, the Joint Board expressly concluded that the public interest did not require other providers of interstate telecommunications to contribute.[3]

PanAmSat agrees with GE Americom and Columbia that requiring satellite operators to contribute to the USF based on revenues derived from interstate telecommunications is neither in the public interest nor, as required by Section 254(d), "equitable and nondiscriminatory." The touchstone of any universal service contribution obligation should be whether the contributing entity burdens the PSTN. In light of the fact that nearly all of non-common carrier satellite services relate to the transmission of video signals which neither interconnect to nor burden the PSTN, it is contrary to the public interest to require satellite operators to contribute to the USF for the provision of such services.

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[1] The Commission correctly concluded in the Universal Service Order that Congress intended "telecommunications services" to be synonymous with "common carrier services." See Universal Service Order ¶ 785.

[2] GE Americom Petition at 5; Columbia Petition at n. 1.

[3] Recommended Decision, 12 FCC Rcd 87 (1996) at ¶ 794.

Moreover, because only common carriers are eligible to receive support from the USF, it is inequitable to require satellite operators providing non-common carrier services to contribute. In short, requiring satellite operators to contribute to the USF based on revenues derived from non-common carrier satellite services is inequitable and contrary to the public interest. For this reason, Section 254(d) of the Act precludes the Commission from requiring contributions based on such activity.

II. THE PROVISION OF BARE TRANSPONDER CAPACITY IS NOT "TELECOMMUNICATIONS."

Notwithstanding the foregoing, even if the Commission were to conclude that the public interest is advanced by requiring satellite operators to contribute to the USF based on revenues derived from the provision of "interstate telecommunications," PanAmSat agrees with GE Americom and Columbia that, in any event, the provision by a satellite operator of bare transponder capacity does not constitute "telecommunications."

> "Telecommunications" is defined in Section 3(43) of the Act as:
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> the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.

(Emphasis added.) As discussed in detail below, when a satellite operator provides "bare transponder capacity" (*i.e.*, when a satellite operator simply gives a third party the exclusive right — usually under a long term sale or lease agreement — to transmit to a specified transponder on a satellite or a specific, discrete portion of a transponder), the satellite operator is merely providing a communications facility and, importantly, is not providing "telecommunications."

A. When A Satellite Operator Provides Bare Transponder Capacity, The Operator Is Not Transmitting A User's Signal.

When a satellite operator enters into a bare transponder agreement with a customer, the satellite operator is merely providing its customer with the exclusive right to transmit to a specified piece of hardware on the satellite. That, essentially, is the extent of the operator's obligation. The customer (and, importantly, not the satellite operator) transmits to the satellite. Indeed, under Section 25.102(a) of the FCC's Rules, the customer (or its designee) is required to obtain a separate earth station license from the FCC to engage in such transmissions.

It is this requirement — that the user of the transponder obtain a separate FCC authorization to transmit to such transponder — that most starkly distinguishes the provision of bare transponder capacity from the provision of private communications services. This separate licensing requirement underscores the fact that it is the customer (or its designee), and not the satellite operator, that is engaged in the "transmission" referenced in the definition of "telecommunications" under Section 3(43) of the Act.

Although a separate authorization is not required to receive a transmission from a satellite and, therefore, an argument can be made that the transmission from the customer's transponder to an earth station authorized by the customer to receive its signal constitutes a transmission by the satellite operator, that argument is flawed in two respects. First, it ignores the fact that the satellite operator is simply providing the user with a facility and that other communications facility providers (*e.g.*, Lucent when it sells or leases switches) are not required to contribute to the USF when they merely provide facilities that are used in connection with telecommunications. Second, even if one concluded that the transmission from the satellite to an earth station was "telecommunications" provided by the satellite operator, it is not "interstate telecommunications," as defined in Section 3(22) of the Act, as it does not originate in

one U.S. state, territory or possession and terminate in another. Such a transmission originates in space from an orbital location that does not belong to the United States and cannot be considered a U.S. state, territory or possession.

In light of the fact that a satellite operator is not transmitting when it merely provides bare transponder capacity, the provision by a satellite operator of bare transponder capacity does not constitute the provision of "telecommunications" under the Act.

B. When A Satellite Operator Provides Bare Transponder Capacity, The Operator Is Not Transmitting Information Of The User's Choosing "Between Or Among Points Specified By The User."

Not only is a satellite operator not "transmitting" when it provides bare transponder capacity, it is not transmitting "between or among points specified by the user." Instead, the entity with the exclusive right to make use of the transponder determines the points from which it will transmit to and downlink from its transponder segment. More often than not, the satellite operator is unaware of the points between or among which the transponder user is transmitting, let alone whether the user is transmitting at all. At most, satellite operators provide a facility through which users can effectuate their own transmissions.

Indeed, a satellite operator has no way of knowing whether a bare transponder user is using its transponder facility for intrastate communications, interstate communications, international communications or foreign communications. The bare transponder user — not the satellite operator — arranges for its own uplinks and downlinks to and from its transponder (and, as discussed above, is separately licensed to engage in such transmissions). Additionally, given that bare transponder agreements are generally long term in nature (usually lasting ten years or for the life of the satellite), a transponder user's use of its transponder will change as its individual communications needs change. The point is, the transponder is the user's facility and

the user configures its transmission paths as it sees fit. At no point in time does the bare transponder user specify to the satellite operator points between or among which the satellite operator transmits the user's information.

C. There Is No Compelling Distinction Between Cable Leased Access Or OVS And The Provision Of Bare Transponder Capacity.

The fact that the provision of bare transponder capacity is not "telecommunications" is consistent with the examples provided by the Commission of other services that do not qualify as "telecommunications" and which, therefore, are not among those that are required to contribute pursuant to the Commission's exercise of its permissive authority under Section 254(d) of the Act. In describing the types of entities covered, the Commission was careful to explain that "cable leased access providers, OVS providers, and DBS providers would not be required to contribute pursuant to [its] permissive authority to require contributions from providers of interstate telecommunications."[4] As these service involve, or may involve, interstate services, and because the services are delivered to end users, it can only be that they are excluded from the obligation to contribute because they are not providing "telecommunications."

There is no compelling distinction, however, between the provision of bare transponder capacity and OVS or cable leased access. In each instance, the owner of telecommunications facilities makes those facilities available to third parties who themselves transmit information via such facilities. Indeed, OVS providers and cable leased access providers have a more significant role in the "transmission" of OVS and cable leased access programming services than do satellite operators over services transmitted using bare transponder capacity. OVS providers and cable leased access providers are ultimately responsible for providing the "downlink" services (the cable box and channel selection services and equipment) and they have greater control over

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[4] Universal Service Order ¶796.

the content of the transmission.[5] Satellite operators, on the other hand, merely provide a transponder on a satellite to a third party that then becomes responsible for all aspects of the "transmission."

III. IMPOSITION OF A UNIVERSAL SERVICE CONTRIBUTION OBLIGATION FOR PROVISION OF BARE TRANSPONDER CAPACITY ALSO WOULD UNDERMINE THE PUBLIC INTEREST.

Not only would the imposition of a contribution obligation for the sale of bare transponder capacity be inconsistent with the Act (given that it is not "telecommunications"), it also would be contrary to the public interest. As explained by GE Americom in its Petition, satellite operators typically enter into long term, fixed price bare transponder agreements well in advance of the launch of the applicable satellite.[6] The Commission, in its Transponder Sales Order, endorsed this approach, recognizing that it was required to foster the development of an industry that faces peculiar risks and start-up costs in the hundreds of millions of dollars.[7]

As demonstrated by the phenomenal growth of the U.S. satellite industry, the Commission's transponder sales policy has been an unqualified success. Indeed, the hundreds of extant privately negotiated bare transponder agreements are the basis for the financing of this important industry.

This financing approach is only viable, however, if both the satellite operator and its customers know with a high degree of certainty at the outset the costs associated with the long term provision of a transponder. The imposition of a new universal service charge in connection with existing bare transponder capacity agreements would

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[5] Cf. Denver Area Educ. Telecomm. Consortium, Inc., v. FCC, 116 S. Ct. 2374 (1996) (upholding §10(a) of the 1992 Cable Act which allows cable operators to prohibit leased access programs believed to be "patently offensive").

[6] GE Americom Petition at 3.

[7] Domestic Fixed-Satellite Transponder Sales, 90 FCC 2d 1238, 1251 (1982).

interfere with the economic assumptions underlying these agreements and introduce considerable uncertainty into satellite operators' contractual arrangements with transponder users. Although these charges represent a minuscule part of the total USF, they represent a considerable unanticipated cost relative to the cost of the transponder.[8]

The FCC's transponder sales policy has been a great success: The Commission must not imperil this success by imposing a USF contribution obligation on the provision of bare transponder capacity, an action which, in any event, would contravene Section 254(d) of the Act.

IV. THE INCLUSION OF INTERNATIONAL REVENUES IS INCONSISTENT WITH THE ACT.

PanAmSat strongly supports Columbia's assertion that the inclusion of international revenues to determine an entity's USF contribution obligations is inconsistent with the Act.[9] Specifically, requiring entities that provide interstate telecommunications services and/or telecommunications to include revenues from international services when calculating their universal service contribution contravenes the requirement in Section 254(d) that contributions be made "on an equitable and nondiscriminatory basis."

As noted by Commissioner Chong in her Separate Statement to the Universal Service Order, such a requirement will place U.S.-licensed satellite operators at a competitive disadvantage *vis-a-vis* foreign-licensed satellite operators that provide only international communications. The emergence of such competitive disparities is

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[8] Although other companies may face similar concerns, the near complete reliance by the satellite industry on long term, privately negotiated, fixed price contracts distinguishes satellite operators from other types of entities in the communications sector.

[9] Columbia Petition at 7.

particularly likely in light of the U.S. market-opening commitments made in the context of the WTO.[10]

In addition to placing U.S.-licensed operators at a competitive disadvantage, the FCC's universal service contribution rules provide satellite operators with a perverse incentive to locate their teleports outside of the United States, resulting in a loss of U.S. jobs. Under paragraph 779 of the Universal Service Order, "[r]evenues from communications between two international points or foreign countries would not be included in the universal service base." Accordingly, all else being equal, companies will locate teleports outside of the United States to avoid USF contribution obligations. Congress could not have intended such a result.

Finally, PanAmSat notes that the instructions to the recently released Universal Service Worksheet state that "[a] carrier will be considered a non-contributing 'international only' or 'intrastate only' carrier if neither it nor any of its affiliates provide any interstate telecommunications."[11] Sweeping in the activities of a carrier's affiliates when calculating a carrier's contribution obligations is wholly inconsistent with Section 254(d), goes substantially beyond the decisions reached in the Universal Service Order, and further compounds the competitive disparities that arise from the inequitable application of the USF contribution obligations with respect to international services.

CONCLUSION

In supporting the Petitions of GE Americom and Columbia, PanAmSat is not suggesting that satellite operators or their customers be given a blanket exemption from

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[10] Even if a foreign-licensed operator provides some interstate services, it is unreasonable to believe that all of such operator's international revenues will be subject to contribution.

[11] Appendix A to Universal Service Worksheet, CC Docket Nos. 97-21, 96-45 (Rel. Aug. 4, 1997) at 11. (Emphasis added.)

USF contribution obligations. When satellite operators or their customers provide interstate telecommunications services, they must contribute. That said, requiring satellite operators to contribute based on revenues derived from the provision of interstate telecommunications is contrary to the public interest and inequitable and, for this reason, contrary to the Act. Additionally, because the provision of bare transponder capacity is not "telecommunications," the FCC does not have authority under the Act to require satellite operators to contribute to the USF based on revenues from such activity. Finally, using U.S. operators' international revenues to calculate their USF obligations is inequitable as it would place U.S. operators at a competitive disadvantage. Accordingly, such an approach is inconsistent with the Act.

For the foregoing reasons, PanAmSat supports the Petitions of GE Americom and Columbia and, in this regard, urges the Commission to take action consistent with such Petitions.

Respectfully submitted,

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August 18, 1997

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Comments of PanAmSat on Petitions for Clarification or Reconsideration of GE Americom and Columbia was sent by hand delivery, this 18th day of August, 1997, to each of the following:

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